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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 750

PHILLIPS PIPE LINE COMPANY, A CORPORATION,

Petitioner,

vs.

MIKE ANTHONY BELUSKO, JR., AND ANNA CATHERINE BELUSKO,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Respondents pray for the denial of the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on October 10, 1962.

STATEMENT OF FACTS

Respondents acknowledge the accuracy of Petitioner's Statement of Facts and adopt such Statement as their own. To that Statement, however, Respondents would add that the Right of Way Contract, which is set forth on pages 3 and 4 of the Petition, was filed on April 21, 1939, in the office of the Clerk and Ex-Officio Recorder in and for Montgomery County, Illinois, and duly recorded in Book 31 of Miscellaneous, page 198 (Record, Appendix p. 40). Respondents would also add that, in 1939, after the laying by Illana Company of the first pipe-line, as described in the first narrative paragraph on page 4 of the Petition, the following receipt was given to the then owner (Record, Appendix pp. 41 and 44):

Receipt For Damages

Draft No. 3567 Serial No. 1/12/5

Received of Illana Company the sum of Forty-Eight and 84/100ths Dollars ($48.84) in full payment of all damages caused by the construction of a pipe line by said Illana Company and W. A. Bechtel Company across the following described land in Montgomery County, State of Illinois:

W/2 of SE/4 of This Receipt also includes payment in full for 22.9 Rods at @ 1.00 per Rod or 22.90.

Section 22 Township 8 N Range 5 W and I certify that I am justly entitled to receive said sum, being the Owner of above described land.

As a part of the consideration hereinabove stated, the undersigned, for himself, his heirs and assigns, hereby agrees with the Illana Company that all the conditions, covenants, terms and provisions of a certain

Right of Way Contract, of like serial number, Recorded in Record 31 page 198 of said County, covering the land or parts thereof as hereinabove described, have been fully and faithfully kept and performed by said Illana Company and that by the execution of this instrument, the undersigned, for himself, his heirs and assigns, hereby adopts, ratifies and confirms all the terms and conditions as contained in said Right of Way Contract.

Witness my hand this 13 day of Dec., 1939.

Witnesses:

/s/ M. S. Gann

/s/ Elizabeth Mehlberg

Respondents had no knowledge of notice, either actual or constructive, of the payment of money to Elizabeth Mehlberg as represented by said receipt (Record, Appendix p. 41).

ARGUMENT

1. The Decision of the Court of Appeals is in Accord With the Applicable Decisions of the Supreme Court of Illinois.

As a reason for granting the Writ of Certiorari, Petitioner says that the decision of the Court of Appeals is not in accord with the applicable decisions of the Supreme Court of Illinois. Specifically, Petitioner says that the Court did not, in construing the instrument in question, consider all of the language contained in that instrument, and that, therefore, the law of Illinois, as it was enunciated in *Shell Oil Co., Inc. v. Moore, et al.*, 382 Ill. 556, 48 N.E. 2d 400 (1943), was disregarded. According to Petitioner, the principle to which the Court of Appeals should have adhered, but did not, is quoted on page 6 of the Petition for Writ of Certiorari.

Respondents answer that the Court of Appeals did consider this principle of construction. Examining the opinion of the Court of Appeals, one finds that the Court presented the facts of the case and then, in the tenth and eleventh full paragraphs of the opinion, said this:

> We agree with the learned District Judge that the critical issue in this case is whether the language of the Right of Way Contract is sufficiently certain so that the intentions of the parties may be determined.
>
> We hold the Right of Way Contract is too indefinite and uncertain to authorize the claimed right of defendant to lay a second pipe line some twelve years after the original pipe line was constructed.

Respondents contend that the Court of Appeals, by affirming the decision of the District Court, incorporated in its opinion, by implication, the reasoning contained in the opinion of the District Court. Looking at the opinion

of the District Court, one finds that the clause, which Petitioner contends was not considered in construing the instrument in question, was, in fact, discussed and considered See the three paragraphs of the District Court opinion on page 24 of the Petition for Writ of Certiorari.

The first of these paragraphs, citing cases decided in Illinois courts, sets forth the principle which Petitioner contends was disregarded. The second paragraph sets forth that language of the instrument which Petitioner contends was not construed. The third paragraph points out that the instrument contains other provisions which have the effect of nullifying whatever might have been intended by that provision upon which Petitioners rely so much. The District Court, then, not only construed that provision which Petitioner contends was overlooked, but, in considering other provisions in conjunction with that provision, pays strict attention to this allegedly overlooked principle of law:

> Where an easement is claimed under a grant, the language of the entire instrument is to be construed to determine whether it was the intention of the parties that the claimed easement was granted.

Respondents contend that Petitioner errs in its argument by assuming that, because the Court of Appeals did not explicitly reiterate the reasoning of the opinion of the District Court, certain matters which the Court of Appeals was bound by law to consider were simply disregarded. In conclusion, the Court of Appeals, by adopting the reasoning of the District Court, reached its decision in accord with the applicable decisions of the Supreme Court of Illinois.

2. The Lower Courts Did Not Depart From Accepted and Usual Judicial Proceedings and Controlling Principles of Law.

Petitioner contends that the Court of Appeals' reliance on the case of *Winslow v. City of Vallejo*, 148 Cal. 723, 84 Pac. 191 (1906), was inappropriate. In that case the Court was construing a granting clause very similar to this one. The granting clause of the instrument dealt with in the *Winslow* case was:

> [The City of Vallejo is granted a right of way as follows.] Being the right of way on, in, through and over the land of the parties of the first part * * * for any water pipes or mains which may be laid by the City of Vallejo * * * etc.

The granting clause of the instrument in this case is:

> For and In Consideration of * * * $50.00, * * * Grantor * * * does hereby grant unto Illana Company, * * * the right to lay * * * a pipe line or pipe lines * * *.

Respondents contend that the similarity is striking, and that the construction put upon one might well determine the construction to be put upon the other.

Petitioner argues, however, that this result does not take into consideration the covenant of the instrument set forth at the top of page 7 of their Petition. But the District Court did deal with the effect to be given to this covenant. Again, see page 24 of the Petition.

If, as the District Court held, and as Respondents maintain, the Right of Way Contract is separable into: 1.) a grant of the right of way limited to one line by the conduct of Petitioner and its predecessors in interest, and 2.) a purported agreement respecting future rights, it follows that the agreement respecting future rights must stand on its own merits as a whole agreement supported by all of the

elements essential to make it binding. It is immaterial whether one calls this agreement an option or an agreement for the sale of an interest in real estate. The elements necessary to make it enforceable are not present.

Certainty in the consideration to be paid for the future rights, or a basis for ascertainment of the consideration, is an essential element to the validity of the purported agreement in the Right of Way Contract in issue here. In *Folsom v. Harr*, 218 Ill. 369, 75 N.E. 987 (1905), the Court held a clause in a lease, which provided that the lessee was to have the first "chance" to buy the leased premises should the lessor decide to sell, too indefinite and uncertain for enforcement for the reason that no standard for fixing a sale price was stated in the agreement. Also, in *Cefalu v. Breznik*, 15 Ill. 2d 168, 154 N.E. 2d 237 (1958), an agreement for the sale of real estate, providing merely for a down payment of $2,000 "and the balance in monthly payments" and leaving undetermined the size and number of installments as well as the period over which they were to extend, was held to be too indefinite and uncertain to be specifically enforceable.

The Right of Way Contract provides:

> Should more than one pipe line be laid under this grant, at any time, *an additional consideration calculated on the same basis per lineal rod as the consideration hereinabove recited* shall be paid for each line so laid after the first line. (Emphasis added.)

The Right of Way Contract recites consideration in the amount of $50.00. But the Right of Way Contract does not state the number of lineal rods for which the $50.00 consideration was paid. How, then, by looking at the contract alone, can the consideration for an additional line be calculated? And the consideration must be calculable from the contract alone, for, while it was stipulated that a receipt

(Record, Appendix pp. 41 and 44) was given to the original owner, which, read in conjunction with the Right of Way Contract, would disclose the total amount paid for the laying of the first pipe line, it is also stipulated that Respondents had no notice, either actual or constructive, of this receipt (Record, Appendix p. 41). Unrecorded instruments are not binding upon bona fide purchasers. See the opinion of the District Court, the last paragraph of page 18 of the Petition for Writ of Certiorari.

CONCLUSION

Respondents say that the decisions of the District Court and the Court of Appeals are in accord with the applicable decisions of the Supreme Court of Illinois; that the rule of construction, which those courts were bound to apply, was, in fact, carefully considered and applied; and that a decision adverse to Petitioner means not that there is a deviation from the controlling principle of law, but rather that there is a difference of opinion as to what is the proper result of applying the proper rule of construction.

For those reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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